NO. 22,145

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES HARAMIS and ANDREAS TRIPLIS,

Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

RESPONDENT'S BRIEF

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JURISDICTION

The petition for review filed herein seeks review of a final order of deportation, and specifically the denial of petitioners' applications for status as permanent residents, pursuant to §245 of the Immigration and Nationality Act (8 USC 1255). Said applications were made during the hearing before the Special Inquiry Officer conducted pursuant to §242(b) of the Act (8 USC 1252(b)). This Court has jurisdiction under §106 of the Act (8 USC 1105a).

STATEMENT OF THE CASE

Petitioners entered the United States for the first time at Honolulu, Hawaii, on January 2, 1967, as nonimmigrants, for the purpose of performing as entertainers, pursuant to §101(a)(15)(H)(iii), (8 USC 1101(a)(5)(iii)). On or about January 27, 1967 petitioners' nonimmigrant status was changed to that of temporary workers, of distinguished merit and ability, pursuant to §101(a)(15)(H)(i) (8 USC (a)(15)(H)(i)). Their status in this classification was twice extended. On May 17, 1967 respondent denied further extension and advised petitioners to leave the United States no later than June 17, 1967.

On or about June 15, 1967 petitioners filed petitions with respondent for classification in third preference status, as immigrants of "exceptional ability" in the arts, pursuant to §203 (a)(3) of the Act (8 USC 1153(a)(3)).

Petitioners did not depart from the United States on June 17, 1967, and on June 19, 1967 orders to show cause issued, charging deportability pursuant to §241(a)(2) of the Act (8 USC 1251(a)(2)), in that they remained in the United States for a longer time than permitted.

At the hearing on June 26, 1967 petitioners filed applications for status as permanent residents pursuant to §245 of the Act (8 USC 1255). A request for continuance of the hearing until respondent should act on the §203(a)(3) applications was denied. The §245 applications were denied, and they were accorded voluntary departure.

Appeal to the Board of Immigration Appeals was dismissed August 15, 1967.

On October 23, 1967 respondent approved the §203(a)(3) applications.

SPECIFICATION OF ERROR

The error specified is in refusing to continue the hearing pending completion of processing of petitioners' §245 applications.

STATUTES

> "SEC. 245. (a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.
> * * * * * * * * * "

"SEC. 203. (a)
(3) Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in section 201(a)(ii), to qualified immigrants who are members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States."

ARGUMENT

Petitioners, by their Counsel, have stipulated to being deportable as charged in the order to show cause (R., p. 19). There is no question as to the sufficiency of the record on the Woodby standard (Woodby v. INS, 385 US 276).

The issue of these cases, if any, concerns the applications for permanent resident status under §245, which are addressed to the discretion of the Attorney General. The disposition of the applications is subject to review on the petitions herein, as the administrative decision was made by the Special Inquiry Officer, and was an integral part of the deportation proceedings.

Foti v. INS
375 US 217, 230

Petitioners concede that to establish eligibility for permanent residence the applicant must show that an immigrant visa is immediately available to him at the time his application is approved. §245(a)(3).

Their argument is directed to the applications made for third preference status under §203(a)(3). They assert (Brief, p. 5) that when they appeared at the hearing, they were without approved preference status and that necessarily the Special Inquiry Officer concluded that an immigrant visa was not available and so denied their §245 applications. They contend that the hearing should have been adjourned pending processing of the §203(a)(3) applications, "and that when such petitions were approved, that immigrant visas would be available to them."

In their final paragraph (Brief, p. 5), they state it is their position that the proceedings be remanded for further administrative processing "to determine whether immigrant visas will be immediately available to them at the time their applications are approved, and, therefore, whether

"they are eligible for status as permanent residents of the United States."

This paragraph opens with the statement, "On October 23, 1967, however, petitioners' request for classification for 'third preference' status was approved, thus giving them a priority position under the Greek quota." This statement is misleading. No contention is made that, as required by §245(a)(3), an immigrant visa is immediately available. Petitioners know that United States Department of State Visa Office Bulletin No. 174 dated July 14, 1967, notes that visas under the third preference portion of the quota for Greece are available only to applicants with petitions filed prior to November 1, 1966 (Tr., p. 3).

The requests for adjournment were also addressed to the discretion of respondent. They were denied because even though the third preference visas had been approved, no immigrant visas would have been "immediately available", as disclosed by the State Department Visa Office Bulletin 179, dated November 15, 1967; third preference under the Greek quota is not

current, and numbers are available for applicants with petitions filed prior to December 16, 1966.

Petitioners filed their petitions for "third preference" status on June 16, 1967. Respondents respectfully submit that there is no showing of abuse of discretion. If there is any basis for relief by way of remand, petitioners should move the Board of Immigration Appeals to reopen.

CECIL F. POOLE
United States Attorney

By: _____
CHARLES ELMER COLLETT
Chief Assistant United States Attorney

DATED: January 11, 1967.

STATE OF CALIFORNIA]
] ss.
CITY AND COUNTY OF SAN FRANCISCO]

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

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Being first duly sworn, I hereby certify that a copy of the foregoing Respondent's Brief was served upon the petitioners by depositing the same in the United States mail on this date at 450 Golden Gate Avenue, San Francisco, California, addressed to the Attorneys for the Petitioners,

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CHARLES ELMER COLLETT
Chief Assistant United States Attorney

Subscribed and sworn to before me
this 11th day of January, 1968:

_____